**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 566 OF 2006**

Maharashtra Rajya Suraksha Rakshak & General Kamgar Union a registered Trade Union having its office at 113, Gautam Udyog Bhavan, First Floor, L.B.S. Marg, Bandup, Mumbai - 400 078. ... Petitioners

V/s.

1. Security Guards Board for Greater Bombay & Thane District having their head office on 2nd floor, Copper Rollers Compound, L.B.S. Marg, Bandup (West), Mumbai - 400 078. ... Respondents

2. M/s. Mount Unique Co-operative Housing Society, having its address at 62-A, Dr. G.D. Marg, Peddar Road, Mumbai - 400 026.

3. The Chairman Mount Unique Co-operative Housing Society Ltd. 62-A, Dr. G.D. Marg, Peddar Road, Mumbai - 400 026.

4. The Secretary, Mount Unique Co-operative Housing Society Ltd. 62-A, Dr. G.D. Marg, Peddar Road, Mumbai - 400 026.

5. The Treasurer Mount Unique Co-operative Housing Society Ltd. 62-A, Dr. G.D. Marg, Peddar Road, Mumbai - 400 026.

6. M/s. Hindustan Security Force a Private Contractor having its office at 172, D.N. Road, Mumbai - 400 021.

Ms. Vaishali Bhilare for the petitioners.
Mr. M.S. Topkar for respondent No.1.
Mr. Chandrasekharan V.V. i/b. Kalyani G. Parmar for respondent Nos. 2 to 5.

**CORAM : F.I. REBELLO &**
**ANOOP V. MOHTA,JJ.**
**DATED : 16th November, 2006**

**ORAL JUDGMENT [PER : F.I. REBELLO,J.]**

. An issue of considerable public importance which arises for consideration in this petition is, whether a co-operative housing society wherein there are tenements both for residential and commercial use is an establishment within the meaning of Section 2(4) of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981, which hereinafter shall be referred to as the Security Guards Act.

2. The petitioner is an union representing employees who are security guards and whose names are listed at Exhibit "A" and according to the averments all the petitioners have been deployed by respondent No. 6 to work as a Security Guard at Mount Unique Co-operative Housing Society. There are in all 116 flats out of which 18 flats are owned by commercial

establishments. The society has engaged through respondent No. 6 around 23 security guards. By an amendment to the petition the petitioners state that day-to-day affairs of respondent No. 1 (respondent No. 2) are organised in a proper and systematic manner. Apart from that respondent No. 2 has engaged the services of one Manager, 2-3 Accountants, 10 Liftmen, 9 House-keepers, one Gardener, one pump operator, one electrician and one plumber to serve the occupants of the society. At the main entrance of respondent No. 2, there is an arrangement of close circuit. By this arrangement, the Security Guard at the main entrance can view the person/s or vehicles standing or entering the main gate on the television fixed on the table of the said security guard. The society has also provided the occupants with the facility of intercom. By virtue of the said facility, the security guard at the main door can easily contact the occupants when required. All occupants can easily contact the security guard when required. The Manager of the society is managing the day-to-day affairs of respondent No.2 and the Accountants take care of the accounts. There is staff of approx. 25 persons employed by the respondent No. 2 to serve the occupants of the society and who are paid salary on

monthly basis. The petitioners, therefore, state that this clearly shows that the society is carrying on organised work like any other commercial establishment and as such is covered under the provisions of the Bombay Shops and Establishments Act.

3. The petitioners' case is that once a society is an establishment within the meaning of Bombay Shops and Establishments Act, the provisions of the Security Guards Act are attracted. As such, the society is required to be registered as the principal employer and can draw security guards from respondent No.1 or exempted security guards through an agency or employ guards directly. Respondent No.2, it is pointed out, has engaged security guards through respondent No. 6 who are being denied the benefits of the service conditions as notified by respondent No.1 Board. The petitioners have, therefore, approached this Court and have prayed for writ of Mandamous or any other appropriate writ or direction, directing respondent No.1 to initiate action against respondent Nos.2 & 6 under Section 42 of the Security Guards Act for contravening clauses 13 and 25 of the Security Guards scheme. Relief is also sought to direct respondent No. 1 to register the Security Guards listed at

Exhibit "A" to the petition and to allot them to respondent No.2. Further relief is to direct respondent No.2 to get registered with the respondent No. 1 Board.

4. Reply has been filed on behalf of respondent No.1. Reference is made to various provisions of the scheme of 2002 framed under the Act. It is pointed out that the guards whose names are listed at Exhibit "A" have not applied to the Board for registration before approaching this Court. However, considering the complaints filed, an Inspector was directed to visit the premises of respondent No.2 Establishment, who has submitted an Inspection Report. The defence of the respondent No.1 that they are not covered by the provisions of the Act is utterly false, frivolous and baseless. Respondent No.2, it is submitted, is an establishment within the meaning of the Act. Reliance is placed on some judgments of this Court, where prosecutions lodged against Co-operative Housing Societies was upheld. This Court, it is submitted, took a view that the provisions of the Act and the Scheme are applicable to a Co-operative Housing Society.

5. The first issue, for consideration, therefore, is whether respondent No.2 is an ‘establishment’ within the meaning of the Security Guards Act. To answer the issue let us consider some provisions of the Act.

. Section 2(4) reads as under:

> "establishment" means an establishment as defined in clause (8) of Section 2 of the Bombay Shops and Establishments Act, 1948 (Bom. LXXIX of 1948);

. Section 2(8) reads as under:

> "principal employer", in relation to any class or classes of Security Guards deployed in a factory or establishment by the agency or agent or Board, means the person who has ultimate control over the affairs of the factory or establishment and includes any other person to whom the affairs of such factory or establishment are entrusted whether such person is called Authorised Representative, Manager or by any other name prevailing in the factory or establishment;

. We may now refer to the provisions of the Bombay Shops and Establishments Act, 1948. Under that Act, Establishment is defined under Section 2(8) and reads as under:

"Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the [State] Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act;

. Shop is defined under Section 2(27) as under:

"Shop" means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers, and includes an office, a store-room, godown, warehouse or work place, whether in the same premises or otherwise, [mainly used] in connection with such trade or business but does not include a factory, a commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;

. 'Commercial Establishment' is defined under Section 2(4), which reads as under: -

"Commercial establishment" means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes establishment of any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant and also includes a society registered under the Societies Registration Act, 1866 (XXI of 1860) and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not any business, trade or profession or work in connection with or incidental or

> ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;"

. From the above definitions, it would be clear that to be an establishment, respondent No.2 must be a shop or commercial establishment. There are no averments in the petition that respondent No.2 is a shop within the meaning of Section 2(27) of the Act. To be a commercial establishment, as can be seen from the definition clause that establishment must carry on any business, trade or profession or any work in connection with or incidental or ancillary to any business, trade or profession. It is only those establishments, which carry on business, trade or profession or work connected with or incidental or ancillary thereto can be said to be a commercial establishment. The petitioners have averred that the affairs of respondent No.2 are organised in proper, systematic manner. We make it clear that we are not considering the issue as to whether respondent No.2 is an 'industry' for the purpose of Industrial Disputes Act, 1947, the definition of which reads as under 2(j): -

> . "Industry" means any business, trade, undertaking, manufacture or calling or employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen;"

or its meaning as explained in **Balgalore Water Supply and Sewerage Viard V/s. A. Rajappa and others, AIR 1978 S,C, 598.** The issue for consideration is whether respondent No.2 is an establishment within the meaning of Section 2(8) of the Security Guards Act.

6. Having said so, we may now consider the judgment relied upon and as to whether those judgments conclude the issue. We may firstly refer to the judgment of learned Single Judge of this Court in **M/s. Tradesvel Security Services Pvt. Ltd. and anr. V/s. The State of Maharashtra and ors., 84 Bom. L.R. 608** which was decided on 02.11.1982 along with other petitions. A learned Single Judge of this Court, was considering challenge to the constitutional validity of the Security Guards Act and Scheme of 1981. The issue, therefore, as to what is an establishment, was not directly an issue before the learned Single Judge. During the course of the discussion, no doubt, the learned Single Judge was pleased to discuss as under:

> "In the first instance, it is not possible to hold definition of "Establishment" in Sub-section (4) of section 2 of the Act will not cover an establishment of co-operative housing society. The said definition is broad enough to include an establishment of a co-operative housing society as well.

. This was a casual observation, which was really not required to be made while deciding the vires of the statute. Even otherwise, it cannot be said that paragraph would lay down a proposition of law that every residential co-operative housing society, even if, does not carry on trade, business or profession or any work in connection with or incidental or ancillary to any business, trade or profession is included within the meaning of 'establishment' under Security Guards Act. The judgment nowhere discusses as how a co-operative housing society can be said to fall within the expression 'establishment'.

. The next judgment relied upon was Criminal Writ Petition No. 899 of 1987 in the case of **M/s. Readymoney Premises Co-operative Society Ltd. V/s. State of Maharashtra,** decided on 20th August, 1992. The issue before the learned Single Judge was issuance of a process against the office bearers of

Co-operative Society for engaging security guards in violation of the provisions of Security Guards Act. From the facts, it emerges that there was a dispute whether the provisions of the Act would apply to a co-operative housing society. A reference was made to the State Government, which can be done under Section 5 of the Act. The State Government replied that it would not apply to a co-operative housing society. The judgment does not reflect whether the procedure under Section 5 had been followed, as otherwise that would have concluded the issue. One of the questions framed was whether petitioner No. 1 is covered under the Security Guards Act and after referring to various judgments including in the case of M/s. Tradesvel Security Services Pvt. Ltd., the learned Single Judge was pleased to hold that co-operative housing society is an establishment within the meaning of Section 2(8) of the Act. The learned judge also observed that a members of a co-operative society occupying different portions of a structure and they being contiguous certain services and amenities had to be provided for the common use and benefit for which members are charged fee.

. Another learned Single Judge in **M/s. Chinar**

**Co-operative Housing Society Limited V/s. State of Maharashtra and ors.** in Criminal Writ Petition No. 1082 of 1987 decided on 22nd February, 1993 proceeded on the footing that the issue, that a co-operative housing society is an establishment, is concluded by the decision dated August 28, 1992 in Criminal Writ Petition No. 899 of 1987.

. Our attention then was invited to a judgment of a learned Single Judge of this Court in **Rashid A Maskati & Ors. and Abbas Ali Hussaini M. & Ors. 1999-III-LLJ (Supp).** That was a case under the provisions of Minimum Wages Act. In that case an order came to be passed against the petitioners under the Minimum Wages Act. The trust therein had tenanted flats which were let out. They had employed persons like liftmen, water pump operator. The issue was whether it was a Commercial Establishment. It would be seen from the fact of the case that the flats in the building were let out on rental basis and for maintenance of the building various persons were engaged by the petitioners. In other words, the petitioners therein were carrying on a business of letting out their premises and receiving income from the same. It is in that context that the learned

Single Judge held that the petitioners therein were a commercial establishment for the purpose of Minimum Wages Act. Appeal was preferred against the said judgment. The learned Division Bench in **Rashid A. Maskati & Ors. V/s. Abbas Ali Hussaini M. & Ors.-III-LLJ (Supp),** came to the conclusion that systematic activity was carried out by rendering services to the tenants which would constitute a commercial activity and consequently held that it would be a commercial establishment within the meaning of Section 2(4) of the Shops and Establishment Act. The learned Bench also noted that Mah. Act 64 of 1974 while amending Section 2(4) of the Bombay Shops and Establishments Act, a charitable trust which carries on any business, trade, profession or work in connection thereto, was included in the definition of "commercial establishment". The learned Division Bench thereafter proceeded on the footing that the services were rendered by the Trust to the tenants of the buildings and in these circumstances that the activity being systematic and rendering of services to the tenants would constitute a commercial activity. As can be noted, the issue was in respect of Minimum Wages Act in respect of which the the expression ‘establishment’ under the Shops and Establishment Act

was considered.

. None of these judgments will really assist us in deciding the controversy. The judgments of the learned Single Judges who have taken a view that Security Guards Act is applicable to co-operative housing society, have barely discussed the issue.

. We may next refer to a judgment of learned Division Bench of the Gujarat High Court in **Smt. Khatija Abdulla Ibrahim Tai and ors V/s. The National Tobacco Company of India Ltd., 1973 (1) MLJ 447**. In that case the appellants were, widow and children of the deceased Abdulla Ibrahim. His appointment was as a salesman or propagandist for expanding the sales of the cigarettes manufactured by the respondent-company. The issue was payment of compensation under the Workmen Compensation Act. An order came to be passed under the Workmen Compensation Act. The appellants aggrieved by the impugned award preferred an appeal. The company took up a stand that deceased was not employee within the meaning of Bombay Shops and Establishments Act, 1948. The issue before the learned Division Bench was whether the deceased was an employee of the respondent company. The learned

Division Bench to answer the question had to consider the definition of Commercial Establishment. The issue before the Division Bench was whether for an establishment to be a commercial establishment, it must have a place, premises or location from where it must be operated. After considering various judgments including of this Court, the learned Division Bench was pleased to hold that there was no need for existence of premises, as existence is of the organisation carrying on business, trade or profession in a commercial manner. The emphasis the Court noted was on the business activity of the organization which carries on trade or business.

7. From the language of the definition of the expression 'commercial establishment', what is apparent is that there must be commercial activity, meaning thereby carrying on of business, trade or profession in a commercial manner. From what we have set out earlier on the facts of record, respondent No. 2 is admittedly a co-operative society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960. Nowhere, in the averments in the petition including the averments as amended have the petitioners averred that the respondent No. 2 is

carrying on any commerce, trade, business or profession. The averments by way of amendment brought are that the society is providing services to its members. In other words, can an activity of members of the society rendering service to itself can be said to be an activity which partake of business, trade or profession. It is possible that respondent No. 2 from the fees collected may have a surplus which would be its profit. Merely because, it provides service to its members which have to be provided to persons who have come together and bound by the Co-operative Society Act, Rules and its own bylaws and generates income and may be profits, does such an activity partake of business, trade or profession which is an essential element of the definition of commercial establishment. The establishment to come within the ambit of the Security Guards Act must therefore carry on business, trade or profession or any work in connection with or incidental or ancillary to any business, trade or profession. The predominant activity must therefore be business, trade or profession or work incidental or connected thereto. In our opinion, the rendering of service by respondent No.2 to itself, meaning thereby to its members, eventhough it may partake of a systematic activity and

the test of profit may be immaterial, nonetheless that activity cannot be said to be either business, trade or profession In construing the expression 'commercial establishment', it is not necessary to apply the test of 'industry' as now understood in the Industrial Disputes Act and which has been explained by the Supreme Court in **Bangalore Water Supply and Sewerage Board V/s. A. Rajappa and others, AIR 1978 SC 548.**

8. The preamble to the Act indicates that it is an act for regulating the employment of private security guards employed in factories and establishments and for making better provision for the terms and conditions of the employment and providing for the welfare by establishment of a board. This being a social and economic legislation, the Court's approach ought to be beneficent, to further the object of the Act. The learned Single Judge in M/s. Tradesvel Security Services Pvt. Ltd. and anr. (Supra) has exhaustively dealt with that issue. It is therefore not necessary for us to once again reiterate what has already been set out therein. We proceed on the footing that the act is piece of social legislation meant for ameliorating the conditions of service of persons working as security guards and to

assure them minimum wage as fixed by respondent No. 1. The State of Maharashtra, in-fact with a view to ascertain the extent of exploitation had conducted rapid sample survey. In the survey done, it was found that most of the security guards were not getting the benefits of provident fund nor gratuity or covered by the provisions of the Employees State Insurance Scheme. It is in these circumstances the Security Guards Act came to be enacted. At the same time, the consequence or failure to comply with the provisions of the Act and the Rules entail prosecution of the principal employer. Once the Act and the rules provide for punishment for contravening the provisions of the Act, even if this Court considering the general principles of beneficent construction in socio-economic legislation, can try to further the object of the Act, nonetheless it will not be open to supplement words and or to extend the meaning of the definition, unless the activity carried on partakes of business, trade or profession.

. If the object was to include private security guards engaged by a housing co-operative society, then in the absence of an expression like ‘undertaking’, it is for the legislature to step in and not for the

Court to extend the meaning. In fact on a reference to the State, under Section 5 of the Act, the State's opinion was that it would not apply to housing co-operative society. We are of the considered view, that a Writ Court should not encrach on a legislative power, prerogative, which the constitution has conferred on the competent legislature. In our opinion, in the instant case, there is no material to arrive at a conclusion that the respondent No. 2 is an 'establishment' within the meaning of the Security Guards Act.

9. Having said so, we must make it clear that it is not as if, every co-operative society is exempted from the provisions of the Security Guards Act. If there is an activity carried on by the society, which partakes of business, trade or profession or in connection or incidental to business, trade or profession, then the said co-operative society would fall within the expression establishment, within the meaning of the Security Guards Act. The activity carried on, in the premises of a housing co-operative society by the society in rendering services to itself or its members will not result into the society becoming an establishment, unless there is material to

indicate that apart from providing services to its members, it is carrying out other activities which would fall within the expression business, trade or profession. If a member is carrying on business, trade or profession in the premises allotted to such a member, then it is not the society carrying on business, trade or profession. The relevant test is whether the society, is carrying on business, trade or profession. If a society is not carrying on business, trade or profession or work in connection or incidental thereto, then it would not be an establishment within the meaning of the Security Guards Act, even if some of its members are carrying on business, trade or profession in the premises allotted to such members. Having said so, we overrule the judgment in **Tradesvel Security Services Pvt. Ltd. and anr. (Supra)** and the judgment in **M/s. Readymoney Premises Co-operative Society Ltd. (Supra)** and **M/s. Chinar Co-operative Housing Society Ltd. (Supra)** to the extent, it is held that a housing co-operative society is an ‘establishment’ within the meaning of the expression ‘establishment" under the Security Guards Act.

10. Insofar as Guards whose names are mentioned in

Annexure "A", if they have already made application, respondent No.1 to consider the said applications and dispose it of according to law at any rate not later than eight weeks from today.

11. We find no merit in this petition. Rule discharged. There shall be no order as to costs.

12. The learned counsel for the respondent No. 1 seeks a stay of the order. We have discharged the rule in the matter. The relief, therefore, of staying the operation of the order cannot be granted. The interim relief, however, granted by this Court by order dated 24th April, 2006 to continue for a further period of 8 weeks from today.

**[F.I. REBELLO, J.]**

**[ANOOP V. MOHTA, J.]**